No. 22691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. ARTHUR BARROWS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

JOHN B. LONERGAN and
LONERGAN, JORDAN & GRESHAM,
398 W. Fourth St.,
San Bernardino, Calif. 92401,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Statutes

Textbook

No. 22691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. ARTHUR BARROWS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

This is an appeal from an interlocutory Order of the District Court for the Central District of California. The Order (1) enjoined Appellants from mining upon an unpatented mining claim located in 1953; and, (2) denied Appellants' motion for summary judgment of dismissal made upon the ground that the Court had no jurisdiction.

The Order from which the appeal was taken [C.T. 310] was entered December 7, 1967, pursuant to a preliminary determination filed October 19, 1967 [C.T. 264]. There was no opinion.

Jurisdiction.

The Order entered December 7, 1967, granted Appellee's motion for a conditional preliminary restraining order restricting and limiting the mining operations of the claim owners, their lessees and sublessees, all of whom are the Appellants. The action was filed and

the injunctive order was made while administrative contest proceedings filed by Appellee against the claim owners (who are two of Appellants) were pending in the Department of the Interior. The administrative contest is still pending on appeal to the Director of the Bureau of Land Management within the Department of the Interior.

The Complaint in this action [C.T. 2] sought preliminary and permanent injunctions to prevent Appellants from operating the claim as an unpatented mining claim by mining, processing and removing the mineral material (sand and gravel) from the claim; an accounting for materials mined and removed from the time of location on July 25, 1953, to the filing of the action, the money values of the sales of material already mined and sold and the amounts of the sales, plus money damages to Appellee, the same to be dependent upon the amounts and values shown by the accounting; also damages, costs and general relief. The conditional order has had the effect of interrupting and suspending mining operations on the claim.

Jurisdiction of the District Court was invoked under 28 U.S.C. sec. 1345 [C.T. 2]. Appellants disputed the jurisdiction of the District Court, by their Answer, their written opposition to the government's motions for preliminary injunction, and their Motion for Summary Judgment of Dismissal for Lack of Jurisdiction [C.T. 227-228], because of the pendency of the administrative contest proceedings [C.T. 57-58, 61-62, 109, 113, 205, 207, and R.T. 19]. They continue to dispute it.

Jurisdiction of this Court is invoked and rests upon 28 U.S.C. sec. 1292. Notice of Appeal was filed January 8, 1968 [C.T. 314].

Statement of the Case.

There has been no suggestion of any wrongful use by Appellants of the surface of the claim for purposes other than mining nor of fraud or bad faith. The Complaint in this action [C.T. 2] is founded upon the government's claim of ownership of the land in the claims and the invalidity of the mining location (Para. IV of the First Cause of Action, repleaded in each of the two other causes of action [C.T. 42]). Appellee's sole ground advanced for the preliminary injunctive relief has been (1) that the claim had been declared void by a hearing examiner's decision in the land office; (2) that the claim is void for several reasons not involved on the pending administrative appeal to the director [C.T. 4, lines 11-14] although raised in the original contest complaint [C.T. 21], and (3) that the United States is the owner of the ground. The contest charged lack of discovery of a valuable mineral, the classification of the mineral as a common variety, and general non-mineral character of the land [C.T. 21]. The examiner merely held the claim void for lack of a *timely* discovery of a valuable mineral deposit. The civil complaint allegations attempt to revive the issues of lack of discovery and of the non-mineral character of the land [C.T. 4].

Appellee, on filing the suit, moved the District Court on notice [C.T. 12] for a preliminary restraining order. Extensive affidavits were filed by both sides and after a hearing, the motion was denied [C.T. 162], the Findings of Fact, Conclusions of Law and Order reciting the conclusion of the Court that the validity of the claim was being determined in administrative contest proceedings in the Bureau of Land Management, and that

until the administrative proceedings had been completed it would be inequitable to grant the injunctive relief [C.T. 162].

Appellee thereupon again moved the Court, this time for a conditional restraining order [C.T. 169]. Appellants opposed by affidavits and written [C.T. 204] and oral [R.T. 19] argument, and also moved for a summary judgment of dismissal of the action [C.T. 227] for lack of jurisdiction, which later they pressed by oral argument as well [R.T. 19].

The Court denied Appellants' motion and granted the conditional restraining order appealed from. The order restricted the owners and operators to mining and removing only that material on the claim which would be seasonably replenished by natural means [C.T. 310].

The claim was located in 1953, almost 2 years to the day before the "common varieties" law was enacted. It is situated in the delta created by the flow of the waters of Grout Creek, near the point at which they reach Big Bear Lake, in San Bernardino County, California [C.T. 74, 93 and 168]. It was owned and operated for its valuable mineral deposits of sand and gravel which, when washed in a commercial aggregates plant, meet portland cement concrete aggregates specifications of the U. S. Forest Service and of the Division of Highways of the State of California, the material being equal or superior to other aggregates materials found in the area. It has been used unwashed in the area for all concrete purposes except school construction [C.T. 26, 70 and 77]. There is a large commercial sand and gravel mining and processing plant on the claim along with the necessary sand and gravel pits created by mining [C.T. 38 and 41]. The plant

has been in its present extensive form since 1960 [C.T. 82]. An application for patent has not been filed. Much of the area in the vicinity of the claim is patented ground, as to which the Forest Service cannot control use [C.T. 77 and 94]. Some of the private ownerships in the area are in commercial and business use [C.T. 73]. Big Bear Lake itself is privately owned [C.T. 10].

The government initiated the administrative contest against the owners of the claim March 18, 1964, through the filing of a contest complaint in the Riverside Land Office of the Bureau of Land Management of the Department of the Interior, asserting that there had been no discovery of a valuable mineral deposit prior to July 23, 1955 (the effective date of the so-called Multiple Use Act, 30 U.S.C. 601 *et seq.*), that the involved mineral was a "common variety" within the meaning of the act, and that the land was non-mineral in character [C.T. 21]. The contest was filed al-almost 11 years after location of the claim in 1953. Contrary to the requirements of the regulations (43 C.F.R. 1852.2-2 and 1852.1-4(a)(1)), all interested parties were not named as contestees. The lessees and sub-lessees (some of Appellants herein) were ignored and not made contestees. The named contestees filed a timely answer to the contest and the issues raised were heard by a hearing examiner of the Bureau of Land Management November 8, 1965. Following submission, the examiner made detailed findings of fact by his decision dated March 14, 1966, to the effect, in part [C.T. 26, 27, 28, 29 and 77], that in the period from the location of the claim up until July 23, 1955, when the common varieties amendment became effective, Mr. Barrows operated the claim and was known to other

persons in the area who were engaged in the sand and gravel business, as one who was in that business; the Barrows operations, while small, showed a profit found by the examiner as ranging from $3.50 to $4.60 per cubic yard of the sand and gravel material sold, with costs of digging, loading, and delivery varying from $0.40 to $1.50 per yard, including the services of Mr. Barrows at $1.50 per hour and depending on the point of delivery; in each of the two years in question prior to July 23, 1955, some sand and gravel on the claim was extracted, removed, and marketed by Mr. Borrows at a substantial profit of from $2.50 to $4.60 per yard, and some was sold by him at the claim for $0.75 per yard; in the period, at least 600 yards of sand and gravel were removed from the claim and sold.

Basing his consideration of the facts found by him upon a then current concept of the "marketability" rule of the Department, rather than the rule recently approved by the Supreme Court in *Coleman,* the examiner determined that the claim was null and void for lack of what he termed a "timely" discovery prior to July 23, 1955, of a valuable sand and gravel mineral deposit under the general mining laws. The examiner stated in his decision that it was agreed by the parties that the material was a common variety and hence not locatable after July 23, 1955. (The contestees deny making this concession and this will be resolved in the agency appeal.) He thus concluded [C.T. 26], contrary to the contention of the contestees, that there had been a failure by the locators to discover a valuable deposit of sand and gravel within the claim between the date of the location in 1953 and the effective date of the common varieties amendment of July 23, 1955, and that the material for which the claim was located by Bar-

rows and which was mined by him and has been mined in the commercial mining operations engaged in thereafter on the claim, was a common variety of sand and gravel within the meaning of Sec. 3 of the act of July 23, 1955 (30 U.S.C. sec. 611) and therefore not subject to consideration as a valuable mineral discovery so as to validate the claim after July 23, 1955.

The contestees took a timely appeal to the Director of the Bureau of Land Management under applicable administrative regulations [C.T. 70-71], and that appeal is pending, undecided. It had the effect of suspending the effect of the decision pending the appeal (43 C.F.R. 1840.0-9(a)). This action was filed June 8, 1967, while the administrative contest was pending on such appeal. The United States has not dismissed the contest and it remains undecided on the appeal.

The intent of the injunctive order having been to restrict and limit the mining claimants and those in active possession under them from mining and removing sand and gravel in excess of such as is "normally replenished seasonally" by the forces of nature within the claim, Appellants are materially prejudiced. Since the making of the original conditional order, the District Judge has amended the form of his Order to prohibit mining and removal of material below a certain line, established under his order to define the contour of the sand pit as of a date in December, 1967. Mining was necessarily stopped by the effect of the Order in February, 1968, because of the absence of a flow of water in Grout Creek sufficient in force and volume to bring replenishing material on to the claim area. The Order of December 7, 1967, has had the effect of en-

joining defendants, pending trial or the further Order of the Court, from using the mining claim as a mining claim under the mining laws of the United States.

This appeal followed.

Questions Involved.

1. Whether the District Court has jurisdiction of this action for an injunction and damages while the validity of the unpatented mining claim, the use of which is sought to be enjoined upon the ground of invalidity, is in the process of being determined in an administrative mining claim contest proceeding first filed by Appellee and which proceedings are still pending upon an administrative appeal by the contestees from a hearing examiner's decision that is expressly made ineffective by the applicable administrative regulations.

Appellants raised the question repeatedly in opposing both motions for preliminary and temporary injunctions [C.T. 109, 113-114, 204 and 207 and R.T. 19], and by moving for dismissal for lack of jurisdiction [C.T. 227-228]. Their Answer also raised the issue [C.T. 57-58, 61-62].

2. Whether the District Court under the facts presented in this action could properly enjoin or restrict *pendente lite* the full possession, enjoyment and use of the claim for mining purposes by the claim owners and their lesses and sublessees, under the general mining laws, until such time as a final administrative determination of invalidity in the pending contest appeal proceedings.

Appellants raised this question by the same means set out under 1, above, the record references being the same.

3. Whether it was inequitable and a deprivation of due process of law to Appellants to exercise jurisdiction in the action to consider requests for injunctive relief or to make an order restraining use of the claim as a mining claim at a time when the question of validity of the claim could not be examined into or determined in the civil case because the issue had been first submitted by Appellee for administrative determination and had not been effectively or finally decided in the administrative proceeding.

The question was raised by the opposition disclosed by the record references given under 1, above, and the absence of due process was pointed out in writing [C.T. 116 and R.T. 39].

4. Whether in any event the *status quo* sought to be maintained by the District Court in such case can mean something other than full possession, enjoyment and use as a mining claim under the general mining laws, including mining and removal in good faith of mineral material from the claim, as engaged in upon the claim in the general period of time just prior to the filing of the action.

Specification of Errors Relied Upon.

1. The District Court erred in exercising jurisdiction in the case at all and in failing to dismiss the action upon the motion of Appellants or to stay it for all purposes.

2. The District Court erred in granting the government's motion for an order restraining and limiting full possession, enjoyment and use of the unpatented mining claim during the pendency of the administrative min-

ing claim contest proceeding which was initiated by the government prior to filing this action.

3. The District Court, if it could properly maintain *status quo* pending final administrative determination of its validity, nevertheless erred in that *status quo* here was the unrestricted operation in good faith of the unpatented mining claim under the mining laws of the United States without limitation on the amount of material removed or replenished in a given or any season or year.

Summary of Argument.

The civil action seeks to limit and curtail a right acquired and held under the general mining laws. That right was property in the fullest sense of the word. Due process of law required, as a minimum for its suspension or termination, that notice be given and an opportunity be afforded for a hearing on the issues involved. A hearing necessarily involves an effective determination by decision.

While the government gave the owners of the record title to the claim notice of the contest and an opportunity to be heard on the issue of validity of the claim, nevertheless under the governing regulations, the preliminary decision of invalidity by the hearing examiner has not become effective and has been suspended from effectiveness during the pendency of the administrative appeal.

The appealing contestees, by the very fact of their administrative appeal, show that they do not agree with

the examiner's decision. Just how the facts found by the examiner will be treated under the recent *Coleman* decision is not known. It is reasonable to assume that the Barrows contest case will be subjected to further administrative consideration and decision, and probably a further appeal can be expected. In any event, the issue remains in the agency's hands, under its regulations. That forum was selected by Appellee, when it filed the contest complaint under Departmental regulations.

The government, by filing the action, ignored the primary jurisdiction of the agency and the "stay of hands" rule of *Best v. Humboldt Placer Mining Company,* 371 U.S. 338 (1963), and also sought to again litigate in the court issues which had been raised by it in the contest complaint before the agency.

Until the administrative agency made its final determination, and in the absence of fraudulent misuse of the mining laws, the filing and maintenance of the civil action forced Appellants who are contestees into two separate forums at the same time, a condition not supported by the stay of hands rule, the rules of primary jurisdiction nor the concept of due process of law. The pendency of the contest appeal forced Appellants to stand mute on the subject of the validity of the claim, against the government's motions for injunctive orders. They could not litigate in the court what should have been the basic issue created by the government's motions for restraining orders—the validity of

the claim. Title was not involved. Right to possession was involved. Proof of its right to possession, in the civil case, was foreclosed merely because of the assertion by the government of the invalidity of the claim.

The obvious lack of due process of law in such a procedure forces the conclusion that, absent fraudulent misuse of the mining laws, the government should stay out of the courts until the administrative proceedings, if adverse to the claimant, have become final. Under the pertinent appeals regulation of the Department, any such administrative decision can be made immediately effective if called for by the facts, thus affording opportunity to the government officers to seek help from the courts and equal opportunity to the contestee to seek judicial review and an order staying enforcement, if called for.

Those of Appellants who were lessees and sub-lessee operators of the claim and not owners, were not named or brought into the contest proceedings, although they certainly were interested parties, and the lack of due process is even more apparent. They could not argue the issue of validity in the court—and they had not had notice or an opportunity to be heard in the agency proceedings.

Finally—because of the so-called marketability rule, relating to discovery of a valuable mineral deposit under the general mining laws—use of the injunctive power of the court in a case such as this operates to forfeit the market of the miner or to deprive him of it, and of

his opportunity to share or compete in it, by shutting down his operation *long before* there is or may be a final determination of the invalidity *or validity* of his claim. (Invalidity need not be a foregone conclusion!) While the answer to the question of validity sought in the agency is not final and thus remains ineffective through the years in which the matter works its way through the decisional processes, a judicial injunctive order such as here issued *pendente lite* and having the effect of suspending mining and sales of mineral from the claim, or of ending them because of consequent economic pressures and therefore loss of market or position in the market, creates great injustice and inequity and a result hardly compatible with due process and equal protection under the law. And, we add, hardly compatible with the intent of the mining law or of the stay of hands rule.

ARGUMENT.

I.

Pendency of the Prior Administrative Contest Proceeding Required at the Very Least That the District Court Should Stay Its Hand and Take No Action Until a Final and Effective Administrative Decision Declared the Claim Void.

The question of the validity of an unpatented mining claim is one the resolution of which is within the exclusive primary jurisdiction of the Secretary of the Interior and not the courts.

The Supreme Court has directly held in *Best v. Humboldt Placer Mining Company,* 371 U.S. 334 (1963), 9 L. Ed. 2d 350, that if a patent has not issued, controversies over a mining claim should be solved by appeal to the Department of the Interior and do not belong in the courts. At page 338 (371 U.S.) the Court said:

> "If a patent has not issued, controversies over the claims 'should be solved by appeal to the land department and not to the courts.' *Brown v. Hitchcock,* 173 US 473, 477, 43 L ed 772, 774, 19 S Ct 485. And see *Northern P.R. Co. v. McComas,* 250 US 387, 392, 63 L ed 1049, 1053, 39 S Ct. 546."

In *Brown v. Hitchcock,* 173 U.S. 473 (1899), the Supreme Court clearly held that the responsibility of the administrative agency to determine matters of title to public lands, so long as patent has not issued, belongs to the agency and should be solved by appeal to it and not to the courts, and said (p. 477):

> "—. As a general rule no mere matter or administration in the various executive departments of the government can, pending such administra-

tion, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.—."

This primary jurisdiction of the agency required the government to first seek relief by filing an administrative contest under the provisions of Sub-part 1852 of 43 C.F.R. (Contest and Patent Proceedings). This it proceeded to do; but, that administrative remedy had not been exhausted when the suit was filed. In truth, the essential element of a decision is lacking, for the examiner's action was not effective during the time an appeal could be taken, and its effectiveness was automatically suspended by the taking of the administrative appeal. The regulation (43 C.F.R. 1840.0-9(a)), applicable to contests and appeals in the agency, provides in pertinent part:

"(a) Normally a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, the officer to whom an appeal may be or is taken may provide that a decision or any part of it shall be in full force and effect immediately."

It matters not that the unusual lengths of time consumed in administrative appeals dictate a need for a rule other than sought here by Appellants, for it is clear that the regulation always permits an administrative contest

decision in the agency to be declared and made immediately effective, as provided in 43 C.F.R. 1840.0-9(a) and (d), thus giving the party adversely affected a right to an early judicial review and giving the appropriate agency the opportunity to seek immediate injunctive and other relief in the courts.

II.

The District Court Had No Jurisdiction to Act in the Case at All and It Should Have Dismissed It.

If the courts should "stay their hands" pending completion of administrative proceedings, no good reason appears for them to retain such an action as here involved, at all. The action should have been dismissed for lack of jurisdiction at this time, in advance of a final and effective agency decision.

In *Far East Conference v. United States,* 342 U.S. 570 (1951), 96 L. Ed. 576, the Supreme Court had to decide whether a District Court could pass on the merits of the complaint, before the Maritime Board had passed on the question involved. It concluded that the Board had primary jurisdiction, and that the civil complaint should be dismissed. It said (at p. 574):

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject mater should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a

premise for legal consequences to be judicially defined. Uniformily and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

And at page 577 it concluded:

"An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari. Pub. L. No. 901, 81st Cong 2d Sess sec. 2, 10, 64 Stat 1129, 1132. If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. 39 Stat 728, 737, 46 USC sec. 828. We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the Government's complaint should now be dismissed, as was the complaint in United States Navigation Co. v. Cunard S.S. Co., 284 US 474, 76 L ed 408, 52 S Ct 274, supra."

In *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 US. 752, 91 L. Ed. 1796, the Supreme Court pointed

out some of the reasons for the primary jurisdiction rule, and said (at p. 767):

> "The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention."

The question of the validity of the location having been assigned to the Secretary of the Interior, the District Court did not have jurisdiction to decide that issue or anticipate the Secretary's final decision, and should have dismissed the complaint. As said in *Macauley v. Waterman Steamship Corporation,* 327 U.S. 540, 544 (1945), 90 L. Ed. 839, 842:

> "In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the Myers Case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act."

In *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50 (1937), 82 L. Ed. 638, 644, the Supreme Court pointed out that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

See also: 2 Am. Jur. 2d (Administrative Law), pages 700-701, sec. 796, where some of the authorities are listed.

III.

This Court May Properly Review the Order Denying the Motion to Dismiss for Lack of Jurisdiction.

While generally this Court may not consider the propriety of an order denying a motion to dismiss upon an interlocutory appeal, it may do so in this case.

Jurisdiction of the action was essential before the District Court could enjoin. In *Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287 (1940), 85 L. Ed. 189, 193, the Supreme Court said, after ruling that an appeal from an interlocutory order for an injunction was proper:

> "However, this power is not limited to mere consideration of, and action upon, the order appealed from. 'If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.' Meccano v. John Wanamaker, 253 US 136, 141, 64 L ed 822, 826, 40 S Ct 463. See also Eagle Glass & Mfg. Co. v. Rowe, 245 U.S. 275, 63 L ed 286, 38 S Ct. 80; Metropolitan Water Co. v. Kaw Valley Drainage Dist. 223 US 519, 56 L ed 533, 32 S Ct 246; Mast, F. & Co. v. Stover Mfg. Co. 177 US 485, 44 L ed 856, 20 S Ct. 708; Smith v. Vulcan Iron Works, 165 US 518, 41 L ed 810, 17 S Ct. 407. Accordingly, the Circuit Court of Appeals properly examined the interlocutory order dnying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision. Reed v. Lehman (CCA 2d) 91 F(2d) 919;

Miller v. Pyrites Co. (CCA 4th) 71 F(2d) 804. Compare Gillespie v. Schram (CCA 6th) 108 F (2d) 39; Rodriguez v. Aresemena (CCA 5th) 91 F(2d) 219; Kneberg v. H. L. Green Co. (CCA 7th) 89 F(2d) 100; Satterlee v. Harris (CCA 10th) 60 F(2d) 490."

In *Eighth Regional War Labor Board et al. v. Humble Oil & Refining Co.* (CCA-5), 145 F. 2d 462, 464, cert. den. 325 U.S. 883, 89 L. Ed. 1998, the court said:

"It first contends that, since the appeal is from an order granting a temporary injunction, and the merits of the case have not been decided, the only issue before the court is whether the lower court abused its discretion in granting the preliminary injunction. It is true that the nature of the appeal precludes a decision on the merits here, but the question of jurisdiction is always vital. A court must have jurisdiction as a prerequisite to the exercise of discretion. The question whther a court has abused its discretion necessarily involves the question whether a court has any discretion to abuse."

See also

Meccano v. John Wanamaker, 253 U.S. 136, 141, 64 L. Ed. 822, 826;

Deckert v. Independence Shares Corp., 311 U.S. 282, 287, 85 L. Ed. 189, 193;

Jones v. Brush (9 Cir.), 143 F. 2d 733, 734.

IV.

A Valid Mining Claim Is a Possessory Right, Good as Though Secured by Patent Against the Sovereign as Well as Third Persons.

A claim location segregates the selected land from the public domain and confers the right of exclusive possession upon the locator. As said in *Wilbur v. United States, ex rel. Krushnic,* 280 U.S. 306, 316-317 (1930), 74 L. Ed. 445:

> "The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property', subject to the lien of a judgment recovered against the owner in a state or territorial court. Belk v. Meagher, 104 U.S. 279, 283, 26 L. ed. 735, 737, 1 Mor. Min. Rep. 510; Manuel v. Wulff, 152 U.S. 505, 510, 511, 38 L. ed. 532-534, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85; Elder v. Wood, 208 U.S. 226, 232, 52 L. ed. 464, 466, 28 Sup. Ct. Rep. 263; Bradford v. Morrison, 212 U.S. 389, 53 L. Ed. 564, 29 Sup. Ct. Rep. 349. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent."

See also: *Cole v. Ralph,* 252 U.S. 286, 295 (1920), 64 L. Ed. 567.

When the invalidity of a mining claim depends upon resolution of a factual issue, such as lack of discovery, the claim can be declared invalid in administration pro-

ceedings only after notice and a hearing, and until such hearing is held or an opportunity afforded for a hearing, and the claim determined to be invalid, there is a deprivation of due process if the claimant is dispossessed.

Adams v. Witmer, 271 F. 2d 29 (1959);

United States v. O'Leary, 63 I.D. 341, 344 (1956).

The injunctive order appealed from seeks to do exactly this—to restrict or end possession and enjoyment merely because of the pendency of the administrative contest proceedings and the existence of the examiner's decision which has not yet been made effective by the Secretary.

This Court, in *Adams v. Witmer,* 271 F. 2d 29 (1959), clearly held that the right of exclusive possession and enjoyment of an unpatented mining claim which had been the object of an administrative contest complaint and had been declared invalid by the Secretary of the Interior after successive appeals in the administrative proceedings, would still be protected by the courts when a timely civil action had been filed to secure a judicial review of the administrative decision. In *Adams,* following the final administrative action, the appellee Berriman, the District Forest Ranger, demanded possession of the claims and orders appellant claim owner to remove his structures and buildings therefrom (somewhat as the appellee seeks to do by judicial proceedings in the case at bar at a time prior to the final administrative decision). The mine claimant in *Adams* asked the District Court to give him temporary injunctive relief against the government representative, Berriman, but the District Court dismissed the case because it felt the claim owner was not entitled to any relief

(apparently for failure to name the Secretary of the Interior as a defendant). After noting (p. 35) that the immediate relief sought by the claimant was the restraint of Berriman, and that the claimant's continued possession and right to work the claims was not dependent upon a patent being issued, this Court concluded the Secretary was not an indispensable party, and that one of the administrative irregularities of which the claimant complained had been waived by him and yet others were still subject to review. On petition for rehearing, the Court held directly that the District Court had jurisdiction to restrain Berriman, saying (at p. 38):

> "But that does not affect the action, as it concerns Berriman, who, after all, is the person who is alleged to threaten appellant's possession. It is that possession appellant seeks to protect and vindicate. Our opinion noted that 'appellant's continued possession of and right to work the mining claims is not dependent upon a patent being issued.' An injunction against Berriman 'will effectively grant the relief desired by expending itself on the subordinate official who is before the court', as we note in our opinion. We perceive no reason why the abatement of the case as against Witmer should affect its continued prosecution against Berriman."

Mining locations and therefore mines are permitted in national forests, and this is recognized in public land law and regulations. Section 1 of the act of June 4, 1897, 30 Stat. 36, found in 16 U.S.C. sec. 478, provides in pertinent part:

> ". . . Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of pros-

pecting, locating, and developing the mineral resources thereof: Provided, That such persons comply with the rules and regulations covering such forest reservations."

Title 43 C.F.R., para. 3400.1 provides in pertinent part:

"(a) Vacant public surveyed or unsurveyed lands are open to prospecting, and upon discovery of mineral, to location and purchase. The act of June 4, 1897 (30 Stat. 36), provides that 'any mineral lands in any forest reservation which have or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry,' notwithstanding the reservation. This makes mineral lands in the forest reserves in the public land states, subject to location and entry under the general mining laws in the usual manner. . . ."

The issue is a sharp one—and in the absence of fraudulent misuse of the mining laws, there should be no right on the part of the government to take the matter into court and there secure an order suspending good faith mining use of the claim in proceedings in which the court cannot inquire into the validity of the claim, and when the issue of validity is still not finally settled in the department—where, it can be hoped, the issue may yet be determined favorably to the appealing contestees.

V.

A Preliminary Injunction Should Not Have Been Granted in Any Event, and the Order Was an Abused Discretion.

The purpose or function of a preliminary injunction is to preserve the *status quo* pending final determination of the action after trial and a full hearing.

Miami Beach Fed. S. & L. Assn. v. Callander, 5 Cir., 256 F. 2d 410, 415;

Tanner Motor Livery, Ltd. v. Avis, Inc., 9 Cir., 1963, 316 F. 2d 804, 808.

Status quo is the last uncontested status which preceded the pending controversy.

Tanner Motor Livery, Ltd. v. Avis, Inc., 9 Cir., 1963, 316 F. 2d 804, 809.

Conclusion.

Pendency of the issue of validity, undecided, in the agency having primary jurisdiction required that the judicial processes be withheld until the issue has been finally resolved in the agency. As said in *United States v. Western Pacific Railroad Co.,* 352 U.S. 59, 63-64 (1956), 1 L. Ed. 2d 126,

> "'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administra-

tive body for its views. General American Tank Car Corp. v. El Dorado Terminal Co., 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325."

Suspension of the judicial process required dismissal, or, as a minimum, a refusal to enjoin and an abatement.

Respectfully submitted,

JOHN B. LONERGAN and
LONERGAN, JORDAN & GRESHAM,
Attorneys for Appellants.

May 28, 1968.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN B. LONERGAN